FILED
JUL 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1492

In the Supreme Court of the United States

VINCENT CUSANO, p/k/a Vinnie Vincent and d/b/a Streetbeat Music and d/b/a Vinnie Vincent Music,
Petitioner,

v.

GENE KLEIN, PAUL STANLEY nee STANLEY EISEN, THE KISS COMPANY, GENE SIMMONS WORLDWIDE, INC., SIMSTAN MUSIC LTD., KISSTORY LTD., and POLYGRAM RECORDS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

LESLIE A. COHEN
LINER YANKELEVITZ SUNSHINE & REGENSTREIF, LLP
1100 GLENDON AVENUE
14TH FLOOR
LOS ANGELES, CA 90024
(310) 500-3560

Counsel for Respondents

BRIAN G. WOLF
Counsel of Record
HENRY L. SELF III
KRISTINA BRITTENHAM
LAVELY & SINGER, P.C.
2049 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067
(310) 556-3501

Counsel for Respondents

Dated: July 24, 2006

QUESTIONS PRESENTED

1. Whether the November 15, 2005 decision by the Ninth Circuit Court of Appeals affirming the district court's entry of judgment on the merits in favor of Respondents as a result of Petitioner's failure to present any competent evidence in support of his claims presents a compelling reason to justify review by this Court.

2. Whether an unsettled factual dispute regarding whether a 1983 agreement between Petitioner and one or more Respondents was "executory," and thereby rejected in Petitioner's 1989 bankruptcy, presents an issue of importance to successful bankruptcy administration.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondents The KISS Company, Gene Simmons Worldwide, Inc., Simstan Music Ltd., and KISStory Ltd. have no parent corporations, nor does a publicly held company own ten percent (10%) or more of the stock of any of said Respondents.

Respondent Polygram Records, Inc. (renamed UMG Recordings, Inc., as of November 30, 1999) is a wholly-owned subsidiary of Vivendi Universal S.A., a publicly held company.

TABLE OF CONTENTS

Questions Presented I

Corporate Disclosure Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Authorities vii

Summary of Reasons to Deny the Petition 1

Statement of the Case 5

I. The Proceedings Below Concluded In Favor of Respondents 5

A. Petitioner Did Not Challenge Findings That He Signed the 1983 Agreement 5

B. The Circuit Court's Prior Opinions 6

1. On Remand, the District Court Dismissed Petitioner's Claims Regarding the Creatures Compositions 7

2. On Remand, the District Court Dismissed Petitioner's Claim for Open Book Account . . 8

3. On Remand, the District Court Dismissed Petitioner's Claims Regarding the Lick It Up Compositions 8

II. Petitioner's 1989 Bankruptcy Action 9

III. Whether The 1983 Purchase Option Was Timely Exercised Presents A Disputed Issue Of Fact 10

Reasons for Denying the Petition 12

I. Petitioner Raises No Disputed Issue of Law Regarding Application of the Bankruptcy Code . 12

A. Respondents' Ownership Interest In the Lick It Up Compositions Never Became a Part of Petitioner's Bankruptcy Estate 13

1. Because Petitioner Had Conveyed His Property Interest In the Lick It Up Compositions to KISS Co. In 1984, No Property Interest In Those Compositions Became Part of Petitioner's Bankruptcy Estate in 1989 13

2. Petitioner Failed to Avoid the Conveyance of His Property Interests In the Lick It Up Compositions During His Bankruptcy Case and He Is Now Time-Barred From Doing So 14

3. Because the Lick It Up Compositions Never Became Property of the Bankruptcy Estate, the Bankruptcy Court Lacked Jurisdiction Over the Compositions 16

B. Confirmation of Petitioner's Chapter 11 Plan Did Not Extinguish Respondents' Property Interests in the Lick It Up Compositions . . . 16

C. Petitioner's Principal Argument Is Based on a Fundamental Misunderstanding of What Constitutes a "Claim" Against a Bankruptcy Estate 17

II. The Petition Is Based On Disputed Issues of Fact 20

A. Whether the Purchase-Option Provision Was Timely Exercised Raises a Disputed Issue of Fact 20

B. Whether the 1983 Agreement Was Executory Raises a Disputed Issue of Fact 21

C. Misstatements of Fact and Law 22

III. The Circuit Court's Decision Was Correct 24

A. The Ninth Circuit's Decision In *Cusano I* Merely Reinstated Petitioner's Right to Assert Certain Royalty Claims 25

B. The Ninth Circuit in *Cusano II* Rejected Petitioner's Interpretation of the Court's Prior Decision 27

IV. No Basis Exists for the Court to Exercise Its Supervisory Authority 27

A. Petitioner Has Raised No Issue of Bankruptcy Law Requiring Resolution 28

B. There Is No Basis For the Court to Issue Summary Reversal 30

Conclusion 30

Appendix

Appendix A - Ninth Circuit Order, Dated 2/15/06 . . . . . 1b

Appendix B - Statement of Executory Contracts, Dated 3/21/89 . . . . . 3b

Appendix C - Bankruptcy Court Order Denying Motion to Reopen, Dated 4/23/99 . . . . . 5b

TABLE OF AUTHORITIES

Cases

Begier v. IRS,
496 U.S. 53, 110 S. Ct. 2258 (1990) 13

Boldt v. Crake (In re Riverside-Linden Inv. Co.),
945 F.2d 320 (9th Cir. 1991) 11-12

Bracewell v. Kelly (In re Bracewell), No. 05-11951,
2006 WL 1814367 (11th Cir. June 30, 2006) 14

Brown v. Dellinger (In re Brown),
734 F.2d 119 (2d Cir. 1984) 14

Brown v. Pitzer (In re Brown),
249 B.R. 303 (S.D. Ind. 2000) 19

Callaway v. Benton,
336 U.S. 132, 69 S. Ct. 435 (1949) 28

City of Memphis v. Greene,
451 U.S. 100, 101 S. Ct. 1584 (1981) 29

City of New York v. Saper,
336 U.S. 328,
69 S. Ct. 554 (1949) 3, 4, 10, 12, 23

Coleman v. Community Trust Bank (In re Coleman),
426 F.3d 719 (4th Cir. 2005) 15

Cooper Indus., Inc. v. Aviall Serv., Inc.,
543 U.S. 157, 125 S. Ct. 577 (2004) 9, 11

CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73,
162 F.3d 405 (6th Cir. 1999) 19

Cusano v. Klein,
264 F.3d 936 (9th Cir. 2001) . . . . . *passim*

Cusano v. Klein,
196 F. Supp. 2d 1007 (C.D. Cal. 2002) 7

Cusano v. Klein,
280 F. Supp. 2d. 1035 (C.D. Cal. 2003)
. . . . . 2, 3, 6, 8, 9, 11, 23

FCC v. NextWave Personal Commc'ns, Inc.,
537 U.S. 293, 123 S. Ct. 832 (2003) 18-19

Fed. Trade Comm'n v. Standard Oil Co.,
355 U.S. 396, 78 S.Ct. 369 (1958) 20

Florida v. Rodriguez,
469 U.S. 1, 105 S. Ct. 308 (1984) 29

Gendreau v. Gendreau (In re Gendreau),
122 F.3d 815 (9th Cir. 1997) 13, 19

Graziadei v. Graziadei (In re Graziadei),
32 F.3d 1408 (9th Cir. 1994) 16

Griffel v. Murphy (In re Wegner),
839 F.2d 533 (9th Cir.1988) 22

Lowenschuss v. Selnick (In re Lowenschuss),
170 F.3d 923 (9th Cir. 1999) 13, 17, 19

Maggio v. Zeitz,
333 U.S. 56, 68 S. Ct. 401 (1948) 28

In re Merchants and Mfrs., Inc.,
166 B.R. 234 (Bankr. D. Del. 1994) 19

Montana v. Kennedy,
366 U.S. 308, 81 S. Ct. 1336 (1961) 29

Moody v. Amoco Oil Co.,
734 F.2d 1200 (7th Cir. 1984) 14

Office of Personnel Mgmt. v. Richmond,
46 U.S. 414, 110 S. Ct. 2465 (1990) 30

New York City Transit Auth. v. Beazer,
440 U.S. 568, 99 S. Ct. 1355 (1979) 29

NLRB v. Bildisco and Bildisco,
465 U.S. 513, 104 S. Ct. 1188 (1983) 21

NLRB v. Manley Truck Line, Inc.,
779 F.2d 1327 (7th Cir. 1985) 22

NLRB v. Pittsburgh S.S. Co.,
340 U.S. 498, 71 S. Ct. 453 (1951) 20

Resare v. Resare,
154 B.R. 399 (D. R.I. 1993) 19

Schweiker v. Hansen,
450 U.S. 785, 101 S. Ct. 1468 (1981) 30

Singleton v. Wulff,
428 U.S. 106, 96 S. Ct. 2868 (1976) 9

Tennessee Student Assistance Corp. v. Hood,
541 U.S. 440, 124 S. Ct. 1905 (2004) 16

United States v. Hale,
422 U.S. 171, 95 S. Ct. 2133 (1975) 29

United States v. Ruzicka,
329 U.S. 287, 67 S. Ct. 207 (1946) 28-29

United States v. Whiting Pools, Inc.,
462 U.S. 198, 103 S. Ct. 2309 (1983) 14

Wilkerson v. McCarthy,
336 U.S. 53, 69 S. Ct. 413 (1949) 28

Wolf v. Weinstein,
372 U.S. 633, 83 S. Ct. 969 (1963) 15

Statutes

11 U.S.C. § 101(4)(1988) 18

11 U.S.C. § 365(a)(1988) 21, 22

11 U.S.C. § 541(a)(1988) 13

11 U.S.C. § 546(a)(1988) 15

11 U.S.C. § 1107(a)(1988) 15

11 U.S.C. § 1141(b)(1988) 16, 23

11 U.S.C. § 1141(c) 2

11 U.S.C. § 1141(d)(1)(1988) 17

28 U.S.C. § 1334(e)(1988) 16

Rules

Fr. R. Bnkr. P. 7001(1) 15

Sup. Ct. R. 10 20

Sup. Ct. R. 10(a) 17

Sup. Ct. R. 10(a)-(c) 1

Sup. Ct. R. 15.2 22

Other Authority

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, Title III, § 541(a), July 10, 1984, 98 Stat. 390 22

SUMMARY OF REASONS TO DENY THE PETITION

The Ninth Circuit Court of Appeals found that "Cusano's entire appeal is frivolous; 'the result is obvious [and] the arguments of error are wholly without merit.' Further, Cusano has repeatedly misrepresented the facts of the case to this court." (Ninth Circuit Memorandum decision dated November 15, 2005 at 2–3 ¶ 5; Petr.'s App. A2–A3 (citations omitted) (alteration in original).)

By this Petition, Cusano presents to this honorable Court many of the same frivolous arguments and misstatements of fact that the Ninth Circuit rejected.

The Petition should be denied because it presents no "compelling reasons" to justify review by this Court. *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Ninth Circuit's Memorandum decision dated November 15, 2005 (Petr.'s App. A) affirming the judgment of the United States District Court for the Central District of California in favor of Respondents and against Petitioner is in conflict with a decision of this Court or another court of appeals, or that the Ninth Circuit's decision otherwise decided an important federal question that has not been settled by this Court, or that the decision answered an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(a)–(c).

At most, the Petition raises one or more disputed issues of fact and relates solely to the rights of and between the parties. Petitioner argues that a purchase-option clause found in a December 8, 1983 employment agreement between Petitioner and KISS Co. (the "1983 Agreement") was not timely exercised. (Petr.'s Br. 6.) Petitioner did not seek or obtain a determination of that factual issue in the lower courts, and the district court found, without objection from Petitioner, that the 1983 Agreement was valid and its terms were

enforceable. The 1983 Agreement "gave KISS Co. one hundred percent ownership rights of Cusano's compositions on the 'Lick it Up' album." *Cusano v. Klein*, 280 F. Supp. 2d. 1035, 1038 (C.D. Cal. 2003).

Petitioner also argues that the 1983 Agreement was an "executory contract" and, consequently, was rejected upon approval of Petitioner's 1990 bankruptcy plan. (Petr.'s Br. 7.) However, Petitioner did not claim that the 1983 Agreement was "executory" in 1989 (when Petitioner filed for bankruptcy); nor is the 1983 Agreement listed in Petitioner's bankruptcy schedules as an "executory contract;" nor is the 1983 Agreement referenced in Petitioner's 1990 bankruptcy plan as a rejected "executory contract."

Petitioner then applies the aforesaid disputed facts to a noncontroversial aspect of bankruptcy law—that non-contested assets of the estate revert to a debtor under 11 U.S.C. § 1141(c) upon confirmation of a debtor's bankruptcy plan. For the reasons stated below, Petitioner's application of this principle of bankruptcy law to the disputed facts of this case presents no compelling reason for this Court to grant review, nor does it otherwise present an issue of importance in the administration of bankruptcy law.

First, Petitioner did not raise or argue application of bankruptcy law in opposition to Respondents' motion for summary adjudication on which Petitioner's appeal in *Cusano II* was based.[1] The district court ruled on the merits of that motion without any argument or reference by the parties to bankruptcy law: "Defendants are entitled to summary judgment on all six claims because Cusano has failed to show

---

[1] The Ninth Circuit's decision in *Cusano v. Klein*, 264 F.3d 936 (9th Cir. 2001) is referred to as "*Cusano I*," while the Ninth Circuit's unreported decision dated November 15, 2005 (Petr.'s App. A) following remand is referred to as "*Cusano II*."

genuine issues for trial." *Cusano v. Klein*, 280 F. Supp. 2d at 1039.

Second, Petitioner fails to establish any erroneous application of bankruptcy law by the Ninth Circuit. Petitioner's effort to create a conflict between the Ninth Circuit's opinions in *Cusano I* and *Cusano II* lacks any support in the record. *Cusano I* was based, in part, on an uncontroversial application of bankruptcy law. In his subsequent appeal in *Cusano II*, Petitioner misapplied the facts to that law—arguing that the fully-performed 1983 Agreement was "executory" and rejected over fifteen years earlier upon confirmation of his bankruptcy plan. The Ninth Circuit in *Cusano II* flatly rejected Petitioner's argument, finding that Cusano "misreads our opinion" in *Cusano I*. (Petr.'s App. A2 at ¶ 2.) This hardly presents a matter of "importance in the administration of the Bankruptcy Act." *See City of New York v. Saper*, 336 U.S. 328, 329, 69 S. Ct. 554, 555 (1949) (footnotes omitted).

Third, Petitioner never sought or received an order from the bankruptcy court or the district court that the 1983 Agreement was rejected upon confirmation of Petitioner's bankruptcy plan in 1990. Petitioner's bankruptcy plan lists 19 rejected "executory" contracts. (ASE 76 at 1498.)[2] The 1983 Agreement is not listed as one of those rejected contracts.

Fourth, when Petitioner filed a motion to reopen his bankruptcy case in 1998 (after commencement of the action in the district court), he did not seek an order from the

---

[2] For the convenience of the Court, Respondents will adopt Petitioner's abbreviations of the record excerpts in the court of appeals: Appellant's original excerpts of record are abbreviated "AE;" Appellant's supplemental excerpts of record are abbreviated "ASE;" and Appellees' supplement excerpts of record are abbreviated "Appellees' SE."

bankruptcy court that the 1983 Agreement had been rejected upon confirmation of his bankruptcy plan in 1990.

Finally, Petitioner fails to demonstrate that the decision appealed from is in conflict with a decision of this Court or any other circuit court, nor does the Petition present any unsettled issues of law.

In short, nothing in the Petition presents a basis for this Court to grant review. Petitioner's claims in the district court lacked any legal or factual support. The district court rightfully dismissed the claims on the merits and the court of appeals affirmed. Petitioner's only grievance is that he lost. Petitioner has sorely abused the judicial process for the past nine years without going to trial on a single issue raised by his complaint. That is because the district court either rejected Petitioner's claims as a matter of law (and the Ninth Circuit affirmed those decisions) or because Petitioner failed to offer any evidence to support his claims despite having repeated opportunities and numerous years to do so. Upon review of the record, the court of appeals in *Cusano II* found Petitioner's second appeal to be so frivolous that it awarded attorneys' fees to Respondents (Petr.'s App. A3) and issued an order barring Petitioner from filing any additional papers with the court of appeals in this matter (Respondents' Appendix "Resp. App." A). Petitioner's abuse of the judicial process continues with his Petition to this Court. Petitioner now argues for the first time that this case presents an issue of extreme "'importance in the administration of the Bankruptcy' laws," yet Petitioner failed to raise this issue before the district court or the bankruptcy court upon his motion to reopen his bankruptcy case. (Petr.'s Br. 14 (quoting *Saper*, 336 U.S. at 329).)

The Court should deny the Petition because the case does not qualify for or otherwise meet the standard of review by this Court.

STATEMENT OF THE CASE

I. The Proceedings Below Concluded In Favor of Respondents.

Petitioner filed his complaint in the District Court for the Central District of California on July 7, 1997.[3] Petitioner claimed that one or more of the Respondents failed to pay Petitioner royalties due from certain songs that Petitioner co-authored with members of the musical group KISS during Petitioner's brief association with the band in 1982 through 1984.[4]

A. Petitioner Did Not Challenge Findings That He Signed the 1983 Agreement.

Petitioner and the KISS Partnership (the predecessor in interest to Respondent The KISS Company) executed a written employment agreement dated September 23, 1982 (Appellees' SE 79 at 1565- 85), which was subsequently amended by the 1983 Agreement (Appellees' SE 79 at 1560–64). Paragraph 5(b) of the 1983 Agreement includes the purchase-option provision regarding Petitioner's interest in the Lick It Up Compositions.

---

[3] Petitioner alleged claims for open book account, breach of fiduciary duty, fraud, constructive fraud, negligent misrepresentation, conversion, imposition of a constructive trust, breach of contract, open book account, right of publicity and defamation. (AE 1.) Petitioner never filed an amended complaint. (Docket *passim*; AE 69.)

[4] Only the musical compositions on the KISS album *Lick It Up* released in 1983 were at issue in the court of appeals in *Cusano II*. Those compositions are entitled: "A Million to One," "All Hell's Breakin' Loose," "And On The Eighth Day," "Exciter," "Gimme More," Lick It Up," "Young and Wasted" and "Not for the Innocent" (the "Lick It Up Compositions"). (Complaint, ¶¶ 47, 48; AE 1 at 15.)

The district court found on several occasions that Petitioner had signed the 1983 Agreement.[5] Petitioner did not object to or appeal those findings.

B. The Circuit Court's Prior Opinions.

This Petition arises from Petitioner's second appeal in the underlying civil action. In 1999, the district court dismissed Petitioner's claims. With respect to the claims regarding the Lick It Up Compositions, the district court ruled that, as a result of Petitioner's failure to adequately schedule his rights in those songs in his 1989 bankruptcy, he lacked standing to seek royalties owed both before and after the filing of the bankruptcy petition. (AE 2 at 82– 83.)

The court of appeals in *Cusano I* agreed with half of the district court's 1999 ruling. The Ninth Circuit held in *Cusano I* that Petitioner lost his right to claim any royalties that may have accrued prior to his 1989 bankruptcy filing but that Petitioner failed to adequately schedule. *Cusano*, 264 F.3d at 947–48. "His failure to do so vests the claim in the bankruptcy estate, where it remains." *Id.* at 948. The court in *Cusano I* held that only claims accruing post-petition may be pursued because Petitioner "retains standing to sue for any royalty payments coming due post-petition." *Id.* (emphasis added).

---

[5] "[P]laintiff admitted executing the December 8, 1983 Agreement [and] it is, therefore, apparent that the 1983 contract was entered into by the parties." (Order, filed June 16, 1998, at 2:18–19, 5:3–4; Appellees' SE 79 at 1769–72); (Order, filed Sept. 15, 1998, at 2:14–19; Appellees' SE 79 at 1775). "Unless otherwise noted, the following facts are undisputed . . . . [i]n December 1983, Defendant KISS Company ("KISS Co."), the KISS partnership's successor in interest, entered into an agreement with Cusano ('Employment Agreement') . . . . The Employment Agreement gave KISS Co. one hundred percent ownership rights of Cusano's compositions on the 'Lick It Up' album." *Cusano*, 280 F. Supp. 2d at 1038 (emphasis added).

Accordingly, the court of appeals in *Cusano I* reinstated and remanded for further proceedings Petitioner's claims for post-bankruptcy royalties generated by the Lick It Up Compositions. *Id.*[6] The court of appeals in *Cusano I* did not make any findings that the 1983 Agreement was rescinded or that any copyright interest in the Lick It Up Compositions reverted to Petitioner.

After remand, Respondents filed motions for summary adjudication demonstrating the lack of merit to Petitioner's remaining claims. Each of those motions was granted by the district court.

1. On Remand, the District Court Dismissed Petitioner's Claims Regarding the Creatures Compositions.

On February 14, 2002, Respondents filed a motion for summary adjudication with respect to a separate group of musical compositions referred to as the Creatures Compositions (the "Creatures Motion"). (Appellees' SE 79 at 1511-43.) In opposing that motion, Petitioner did not allege that the 1983 Agreement was abrogated or that any copyright interest was reconveyed to Petitioner as a result of his discharge from bankruptcy. (Appellees' SE 84 at 2291-2307.)

In a published decision, the district court dismissed Petitioner's claims regarding the Creatures Compositions. *Cusano v. Klein*, 196 F. Supp. 2d 1007, 1016 (C.D. Cal. 2002).

---

[6] Specifically, the Court reinstated Petitioner's post-petition claims for open book account (claim 1), breach of fiduciary duty (claim 2), fraud (claim 3), constructive fraud (claim 4), negligent misrepresentation (claim 5), conversion, (claim 9) and imposition of constructive trust (claim 10).

2. On Remand, the District Court Dismissed Petitioner's Claim for Open Book Account.

On February 25, 2002, Respondents filed a motion for summary adjudication on Petitioner's claim for open book account (the "Open Book Motion"). (Appellees' SE 82 at 1835–68.) In opposing that motion, Petitioner did not allege that the 1983 Agreement was abrogated or that any copyright interest was reconveyed to Petitioner upon his discharge from bankruptcy. (Appellees' SE 88 at 2580–96.)

The district court granted the motion, dismissing the claim for open book account. (Civil Minutes, dated April 9, 2002, at 2–4; Appellees' SE 97 at 2727–32.)

3. On Remand, the District Court Dismissed Petitioner's Claims Regarding the Lick It Up Compositions.

On June 2, 2003, Respondents filed a motion for summary adjudication with respect to the remaining claims regarding the Lick It Up Compositions (the "Lick It Up Motion"). (Appellees' SE 119 at 3047–79). The Lick it Up Motion alleged that the 1983 Agreement conveyed 100% of all right, title, and interest, including the copyrights, in the Lick it Up Compositions to the KISS Co. (Appellees' SE 119 at 3062.)

Petitioner's opposition to the Lick It Up Motion made no reference to bankruptcy law, nor was there any argument that the 1983 Agreement was abrogated or that any copyright interest was reconveyed to Petitioner upon Petitioner's discharge from bankruptcy. (Appellees' SE 126 at 3231–38.)

In a published decision, the district court granted the Lick It Up Motion and ended the trial-level litigation in this case. *Cusano v. Klein*, 280 F. Supp. 2d at 1037 n.1. The district court granted the Lick It Up Motion on the merits: "Defendants are entitled to summary judgment on all six

claims because Cusano has failed to show genuine issues for trial. Each of his claims is premised on Defendants' allegedly false royalty statements, but he has utterly failed to produce any evidence whatsoever of inaccuracies in the accounting . . . ." *Id.* at 1040.

Petitioner did not argue the application of bankruptcy law in opposition to the Lick It Up Motion, nor did the district court consider or make any reference to the application of bankruptcy law in rendering its decision. Wherefore, Petitioner's subsequent effort to interject his new bankruptcy law argument before the court of appeals in *Cusano II* lacked merit. "It is the general rule, of course, that a federal appellate court does not *consider an issue not passed upon below." Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976).

Accordingly, Petitioner's bankruptcy argument—which forms the principal basis for his seeking review by this Court—was not preserved on appeal and does not present a compelling reason for review by this Court. *See Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 168–69, 125 S. Ct. 577, 585 (2004) (Supreme Court ordinarily does not decide in the first instance issues not decided below).

II. Petitioner's 1989 Bankruptcy Action.

On or about March 7, 1989, Petitioner filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Central District of California. Attached to Petitioner's bankruptcy schedules and statements of affairs dated March 21, 1989 is a "Statement of Executory Contracts." (Resp. App. B, 4b) The 1983 Agreement was not listed by Petitioner as an "executory contract."

On or about April 27, 1990, Petitioner filed a Chapter 11 plan, which was subsequently confirmed by the bankruptcy court on or about September 18, 1990. (ASE 76.) Likewise,

the bankruptcy plan does not list the 1983 Agreement as an "executory contract."

Eight years later, in December 1998, Petitioner filed a motion to reopen his bankruptcy case. That motion was made by Petitioner as a result of an order entered by the district court dated December 3, 1997, whereby the court found that, absent approval of the bankruptcy court, Petitioner lacked standing to pursue his claims in the district court. (AE 2 at 59.)

In seeking to reopen his bankruptcy case, Petitioner did not argue or request an order from the bankruptcy court that the 1983 Agreement was rejected. On or about April 27, 1999, the bankruptcy court entered its order denying Petitioner's motion to reopen his bankruptcy case. (Resp. App. C.)

In sum, when Petitioner was before the bankruptcy court in 1990 and again in 1998, he failed to make the very argument that he now claims presents such an important issue with respect to the "'administration of the Bankruptcy' laws"—that the issue should be considered for the first time by this Court. (Petr.'s Br. 14 (quoting *Saper*, 336 U.S. at 329) (footnote omitted).)

III. Whether The 1983 Purchase Option Was Timely Exercised Presents A Disputed Issue Of Fact.

The 1983 Agreement grants all right, title, and interest in the Lick It Up Compositions to the KISS Partnership, predecessor-in-interest to Respondent The KISS Company.[7]

---

[7] Paragraph 5(a) of the 1983 Agreement states:

> The Partnership shall exclusively own and control one hundred percent (100%) of all right, title and interest, including the copyrights, all rights under such copyrights and all rights to the so-called "publisher's share" of income derived from the

Petitioner failed to present any evidence in the district court to support his claim that the copyright interests in the Lick it Up Compositions reverted to him in or around 1984 because KISS failed to timely exercise the purchase-option provision of Paragraph 5(b) of the 1983 Agreement.

Moreover, when Respondents brought their motions for summary adjudication after remand, Petitioner did not present the district court with evidence to support this argument. Indeed, the district court affirmed that KISS owns 100% of the Lick It Up Compositions:

> Defendants are entitled to summary judgment since Cusano cannot establish that he has ownership rights in the royalties allegedly due him. KISS Co. "exclusively own[s] and control[s] one hundred percent (100%) of all right, title and interest [in the Compositions], including the copyrights, all rights under such copyrights, and all rights to the so-called 'publisher's share' of income derived from the worldwide exploitation of such copyrights."

Cusano, 280 F. Supp.2d at 1043 (alternations in original) (quoting the 1983 Agreement).

Petitioner did not appeal that finding by the district court. Thus, Petitioner failed to preserve this argument on appeal in *Cusano II*, and it should not be considered by the Court. *See Cooper*, 543 U.S. at 168–69 (Supreme Court ordinarily does not decide in the first instance issues not decided below); *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d

---

worldwide exploitation of such copyrights, in and to your musical compositions (or, where applicable, your share of co-written musical compositions) which are included in the album heretofore recorded by KISS entitled "Lick It Up" (the "Current LP").

(Appellees' SE 79 at 1561.)

320, 24 (9th Cir. 1991) (issue waived on appeal when appellant did not argue it in opening brief).

REASONS FOR DENYING THE PETITION

I. Petitioner Raises No Disputed Issue of Law Regarding Application of the Bankruptcy Code.

The principal basis on which Petitioner seeks review by this Court amounts to little more than application of an uncontroversial aspect of bankruptcy law. Petitioner argues that a confirmed reorganization plan constitutes a final judgment that is res judicata as to any claims that were or could have been raised in the bankruptcy proceeding. (Petr.'s Br. 15.) Respondents do not dispute that basic proposition. However, the application of that proposition of bankruptcy law to the facts of this case does not present a compelling reason for this Court to grant review, nor does it present any issue of "importance in the administration of the Bankruptcy Act." *See Saper*, 336 U.S. at 329 (footnotes omitted).

The record is undisputed that, as a matter of contract, Petitioner did not have any copyright interests in the Lick It Up Compositions at the time he filed for bankruptcy in 1989. The 1983 Agreement expressly states that KISS Co. owns the entire copyright to the Lick It Up Compositions. Paragraph 5(a) of the 1983 Agreement states: "The Partnership [KISS Co.] shall exclusively own and control one hundred percent (100%) of all right, title and interest, including the copyrights [in the Lick It Up Compositions]." (1983 Agreement; Appellees' SE 79 at 1561 (emphasis added).)[8]

---

[8] The district court made a judicial finding that Petitioner admitted signing the 1983 Agreement and that the KISS and Petitioner entered into the 1983 Agreement. (Order, filed June 16, 1998, 2:18–19, 5:3–4; Appellees' SE 79 at 1769, 1772.)

A. Respondents' Ownership Interest In the Lick It Up Compositions Never Became a Part of Petitioner's Bankruptcy Estate.

1. Because Petitioner Had Conveyed His Property Interest In the Lick It Up Compositions to KISS Co. In 1984, No Property Interest In Those Compositions Became Part of Petitioner's Bankruptcy Estate in 1989.

"The commencement of a case under section 301 . . . of this title creates an estate." 11 U.S.C. § 541(a) (1988).[9] Property of the estate "includes all of the debtor's legal or equitable interests in property as of the commencement of the case." *Begier v. IRS*, 496 U.S. 53, 59, 110 S. Ct. 2258, 2260 (1990). Because Petitioner conveyed his interest in the Lick It Up Compositions to KISS Co. in 1984, he did not hold any legal or equitable interest in those compositions to become property of his bankruptcy estate when he filed his bankruptcy petition in 1989.

In his Petition, Petitioner incorrectly argues that by placing "songrights in . . . Songs written while in the band known as 'KISS'" on Schedule B of his bankruptcy schedules he obtained or revived a property interest in the Lick It Up Compositions. (Petr.'s Br. 16–18.) "Bankruptcy recognizes estate property rights, and filing bankruptcy cannot give a debtor a greater interest in an asset than that which he owned pre-bankruptcy." *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 930 (9th Cir. 1999) (quoting *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815, 819 (9th Cir. 1997)).

---

[9] All Title II citations are to the 1988 official version of the United States Code, the Bankruptcy Code in effect when Petitioner filed his bankruptcy petition (March 7, 1989).

It is well-settled that a debtor cannot use his bankruptcy filing to augment his property interests beyond what they were on the day before he filed his bankruptcy petition. *Bracewell v. Kelly (In re Bracewell)*, No. 05-11951, 2006 WL 1814367, at *1 (11th Cir. June 30, 2006) ("[A] debtor's estate cannot be greater than the property rights the debtor had at the commencement of the case"); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) ("[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less"); *Brown v. Dellinger (In re Brown)*, 734 F.2d 119, 124 (2d Cir. 1984) ("It is true of course that upon the filing of a petition in bankruptcy, the bankruptcy estate can have not greater interest in property included in it than the debtor had when the petition was filed").

Petitioner fails to cite any legal authority in support of his conclusion that by scheduling "songrights" on his bankruptcy schedule he revived or reconveyed his interest in the Lick It Up Compositions back to himself or his bankruptcy estate. By contrast, it is black letter bankruptcy law that Petitioner could not increase his property interests merely by filing for bankruptcy.

2. Petitioner Failed to Avoid the Conveyance of His Property Interests In the Lick It Up Compositions During His Bankruptcy Case and He Is Now Time-Barred From Doing So.

Property of the estate also includes property which may be recovered by the trustee or debtor-in-possession utilizing the Bankruptcy Code's avoidance powers. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, 103 S. Ct. 2309, 2313-14 (1983) (describing avoidance provisions such as section 543 (turnover of property by a custodian), section 547

(avoidance of preferences), and section 548 (avoidance of fraudulent transfers)).

Therefore, when Petitioner filed his bankruptcy petition in 1989, his bankruptcy estate also included property interests which could be returned to the estate pursuant to sections 543, 544, 547, or 548 of the Bankruptcy Code. These sections give a bankruptcy trustee certain powers to recover property belonging to the bankruptcy estate which is being held by another party or which was impermissibly transferred by the debtor to another party. As a debtor in possession, Petitioner enjoyed the same avoidance powers as a bankruptcy trustee. 11 U.S.C. § 1107(a) (1988); *Wolf v. Weinstein*, 372 U.S. 633, 649-50, 83 S. Ct. 969, 979-80 (1963) (debtor in possession has a fiduciary duty to the estate); *Coleman v. Community Trust Bank (In re Coleman)*, 426 F.3d 719, 729 (4th Cir. 2005).

If Petitioner actually believed in 1989 that his conveyance of rights to the Lick It Up Compositions was avoidable in his bankruptcy case, he should have filed an adversary proceeding to avoid that conveyance[10]. He did not do so. The statute of limitations for Petitioner to file avoidance actions ran out at the time his bankruptcy case was closed (April 15, 1994). 11 U.S.C. § 546(a) (1988) ("An action or proceeding under section 544 . . . 547, 548 . . . of this title may not be commenced after the earlier of (1) two years after the appointment of a trustee . . . or (2) the time the case is closed or dismissed"). Therefore, Petitioner's current claim that his conveyance of his interest in the Lick It Up Compositions in 1984 is avoidable was time-barred long ago.

---

[10] Federal Rule of Bankruptcy Procedure 7001(1) requires the filing of a complaint to initiate an adversary proceeding "to recover money or property . . ." Fr. R. Bnkr. P. 7001(1).

3. Because the Lick It Up Compositions Never Became Property of the Bankruptcy Estate, the Bankruptcy Court Lacked Jurisdiction Over the Compositions.

"[T]he district court in which a case under title 11 is commenced or pending shall have exclusive jurisdiction (1) of all property, wherever located, of the debtor as of the commencement of such case." 28 U.S.C. § 1334(e) (1988); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S. Ct. 1905, 1910 (2004). If property falls outside of the bankruptcy estate, the bankruptcy court has no jurisdiction over that property. *Graziadei v. Graziadei (In re Graziadei)*, 32 F.3d 1408, 1410 n.2 (9th Cir. 1994).

Because the Lick It Up Compositions never became part of Petitioner's bankruptcy estate, the bankruptcy court lacked jurisdiction over the compositions under Section 1334(e) and *Graziadei*. *See* 28 U.S.C. § 1334(e); 32 F.3d at 1410 n.2.

B. Confirmation of Petitioner's Chapter 11 Plan Did Not Extinguish Respondents' Property Interests in the Lick It Up Compositions.

Petitioner incorrectly argues that confirmation of his bankruptcy plan revested in him the Lick It Up Compositions. (Petr.'s Br. 17–18, 22–23.) However, by the express language of the Bankruptcy Code, only property of the estate may revest in the debtor. 11 U.S.C. § 1141(b) (1988) ("confirmation of a plan vests all of the property of the estate in the debtor"). Because the Lick It Up Compositions never became property of the Cusano bankruptcy estate, they could not have vested in Petitioner upon confirmation of his plan.

Petitioner also incorrectly argues that confirmation of his plan somehow terminated Respondents' "claims" to the compositions. (Petr.'s Br. 17–18.) However, as discussed below, Respondents held a property interest in the

compositions and did not hold a claim against the estate. While confirmation of Petitioner's plan discharged Petitioner from debts and claims under section 1141, confirmation did not, and could not, extinguish Respondents' property interests in the Lick It Up Compositions. § 1141(d)(1) (1988) (". . . confirmation of a plan (A) discharges the debtor from any debt that arose before the date of such confirmation . . . ."). Because an ownership interest is not a "claim" or a "debt," it cannot be discharged or extinguished by confirmation of the debtor's chapter 11 plan. *Lowenschuss*, 170 F.3d at 930–31.

In addition, by the bankruptcy plan's own words, a "rejection" of a contract simply means that "the Debtor is then released from all further liability and obligations." (ASE 76 at 1498.) Thus, even if the 1983 Agreement had been rejected in bankruptcy, that would only mean that Petitioner was released from any obligations he had thereunder (which were none, in any event).

C. Petitioner's Principal Argument Is Based on a Fundamental Misunderstanding of What Constitutes a "Claim" Against a Bankruptcy Estate.

Petitioner acknowledges that there is no circuit split with respect to the bankruptcy issue presented: "the current Petition does not involve a "split" as do many of this Court's cases." (Petr.'s Br. 15.) However, in an effort to fabricate an issue that "so far departed from the accepted course of judicial proceedings" to merit review by this Court under Supreme Court Rule 10(a), Petitioner argues that Respondents were obligated to present a claim in Petitioner's 1989 bankruptcy proceeding with respect to the 1983 Agreement and, because they did not, the 1983 Agreement was rejected upon confirmation of the bankruptcy plan in 1990. (Petr.'s Br. 15–17.) This argument is factually and legally baseless.

As previously stated, Respondents have a property interest in the Lick It Up Compositions, not a claim.

Petitioner's argument is based on the faulty assumption that because Respondents acquired all right, title and interest to the Lick It Up Compositions in 1984, Respondents must have had a "claim" against his bankruptcy estate in 1989. The fundamental flaw in this argument is that Respondents held a property interest in the Lick It Up Compositions; they did not hold a "claim" within the meaning of the Bankruptcy Code against the Cusano bankruptcy estate. *See* 11 U.S.C. § 101(4) (1988).

A property interest is not a "claim." A property interest belonging to a third party does not become property of the bankruptcy estate and therefore cannot vest in the debtor upon confirmation. Confirmation only discharges debts—it does not extinguish property interests.

A "claim" is a bankruptcy term of art and is defined by section 101 of the Bankruptcy Code as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Id.

The "plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation . . . ." *FCC v.*

NextWave Personal Commc'ns, Inc., 537 U.S. 293, 303, 123 S. Ct. 832, 834 (2003).

Unless a legal relationship gives rise to an asserted right to payment from the debtor, the third party does not hold a "claim" against the debtor within the meaning of section 101. *CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73*, 162 F.3d 405, 408–09 (6th Cir. 1999) (pension plan did not hold a "claim" against employer's bankruptcy estate based on withdrawal liability as pension plan had no enforceable right to payment); *In re Merchants and Mfrs., Inc.*, 166 B.R. 234, 237 (Bankr. D. Del. 1994) (same).

Here, while the 1983 Agreement created a legal relationship between Petitioner and KISS Co., that agreement did not create any right to payment *from* Petitioner to KISS Co. Rather than creating a debt of Petitioner in favor of the KISS Co., the 1983 Agreement created an ownership interest in the Lick It Up Compositions in favor of KISS Co. In other words, the 1983 Agreement created a property interest, not a "claim" within the meaning of section 101 of the Bankruptcy Code. *See Gendreau*, 122 F.3d at 818–19 (ex-husband's bankruptcy case could not eliminate the ex-wife's property interests and filing a bankruptcy case cannot give a debtor greater property rights than he would have outside of bankruptcy); *Lowenschuss*, 170 F.3d at 930–31 (citing *Gendreau*, 122 F.3d at 818–19).

Cases from other circuits reaching the same result that property rights of third parties do not constitute a claim are abundant. *See, e.g., Brown v. Pitzer (In re Brown)*, 249 B.R. 303, 308–09 (S.D. Ind. 2000) (separate property interest in the pension fund "is neither a debt owed by [Debtor] nor a part of his bankruptcy case subject to discharge"); *Resare v. Resare*, 154 B.R. 399, 403 (D. R.I. 1993) (ex-wife's interest

in her former husband's pension is her sole and separate property, and not a part of the bankruptcy estate).

Here, because Petitioner had fully performed all of his obligations under the 1983 Agreement prior to the filing of his 1989 bankruptcy petition, KISS Co. did not have a claim—a right to payment from Petitioner—when Petitioner filed his 1989 bankruptcy petition within the meaning of section 101 of the Bankruptcy Code.

II. The Petition Is Based On Disputed Issues of Fact.

A. Whether the Purchase-Option Provision Was Timely Exercised Raises a Disputed Issue of Fact.

The Petition is based on a disputed issue of fact. Petitioner argues that Respondents did not timely exercise the purchase-option provision of the 1983 Agreement while, on the other hand, Respondents claim that the purchase-option provision was timely exercised. That disputed fact does not raise any issue affecting the administration of the bankruptcy courts, nor does it constitute a compelling reason for this Court to grant review. Rather, the dispute in this case relates solely to the rights of and between the parties.

A factual dispute in the lower court does not constitute a basis for the Supreme Court to grant a writ of certiorari. Sup. Ct. R. 10 (writ of certiorari rarely granted when the asserted error consists of erroneous factual findings); *Fed. Trade Comm'n v. Standard Oil Co.*, 355 U.S. 396, 400, 78 S.Ct. 369, 371 (1958) (explaining that the Court will "adhere to the usual rule of noninterference" when there is a factual dispute); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503, 71 S. Ct. 453, 456 (1951) (clarifying that the Supreme Court "is not the place to review a conflict of evidence").

B. Whether the 1983 Agreement Was Executory Raises a Disputed Issue of Fact.

Petitioner's 1990 bankruptcy plan did not reject the 1983 Agreement. (ASE 76 at 1498.) In fact, the relevant section of the bankruptcy plan lists 19 contracts which were rejected—and the 1983 Agreement is not one of them.[11]

The 1983 Agreement was not "executory" because, at the time of Petitioner's bankruptcy in 1989, Petitioner had no further obligations under the 1983 Agreement. A bankruptcy trustee may assume or reject any executory contract of the debtor. 11 U.S.C. § 365(a) (1988). An "executory contract" is one "on which performance is due to some extent on both sides." *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 522-23 n.6, 104 S. Ct. 1188, 1194 n.6 (1983) (legislative history to

---

[11] Petitioner's 1990 bankruptcy plan states in relevant part:

5.1 Executory Contracts.

(a) All executory contracts or unexpired leases of the Debtor which have not been specifically assumed by the Debtor as authorized by order of the Bankruptcy Court either prior to the date of confirmation of the Plan or after a hearing for which notice is given within forty-five days after the Effective Date of the Plan will be deemed rejected. These include Debtor's executory contracts, to the extent they are executory contracts and have not already been rejected, with Axic Worldwide, Ltd.; Excalibur, Nigel Thomas, International Talent Group, Wayne Forte, Brockum Company; Carvin Guitars, Chrysalis Records; Nadysystems, Inc., New Image, P.B. Serbin, Parks, Palmer, Turner & Yemendjian, Pro-Mark Corp., Sound Castle Recording Studio, Sound Design Studios, Inc., Bruce Mancinelli, George Sewitt, Siegel & Feldstein, Washburn International. In the event that an executory contract or unexpired lease is rejected, the Debtor is then released from all further liability and obligations.

(ASE 76 at 1497-98.)

§ 365(a) supports this definition), superceded by statute on other grounds, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, Title III, § 541(a), July 10, 1984, 98 Stat. 390, as recognized in *NLRB v. Manley Truck Line, Inc.*, 779 F.2d 1327, 1332 n.7 (7th Cir. 1985). More precisely, a contract is executory if "the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 536 (9th Cir.1988).

Here, Petitioner had no further obligations under the 1983 Agreement at the time of his bankruptcy filing in 1989. Petitioner was not obligated to perform on stage, write new songs, or do anything. Because Petitioner had fully performed under the 1983 Agreement, that agreement was not an executory contract that confirmation of Petitioner's bankruptcy plan in 1990 could have been deemed to "reject". In any case, at most, this argument presents little more than a disputed issue of fact.

C. Misstatements of Fact and Law.

Pursuant to Supreme Court Rule 15.2, the Petition contains the following misstatements of fact and law that might bear on the issues before this Court if certiorari were granted.[12]

---

[12] Misrepresenting the record is nothing new for Petitioner. Prior to the initial appeal, the district court admonished Petitioner and his then-counsel at length for a lack of veracity when presenting arguments to the court. "[T]he record reflects that counsel for plaintiff 'clearly and unequivocally' misrepresented to Magistrate Judge Jones 'that there were no additional responsive documents in plaintiff's possession responsive to any of defendant's document requests.'" (Order Granting Defendants' Motions for Summary Adjudication, Etc., entered April 14, 1999 at 9; AE

1. Petitioner misstates the law in arguing that, upon his discharge from bankruptcy in 1990, a copyright interest in the Lick It Up Compositions reverted to Petitioner. Only "property of the estate" vests in the debtor upon confirmation of the bankruptcy plan. 11 U.S.C. § 1141(b). Petitioner had conveyed all of his right, title, and interest in the Lick It Up Compositions five years earlier pursuant to the 1983 Agreement. Accordingly, Petitioner had no ownership interest in the Lick It Up Compositions when he commenced his bankruptcy action in 1989.

2. Petitioner misstates the fact that the purchase-option provision of the 1983 Agreement was not timely exercised by KISS in 1984. (Petr.'s Br. 14.) Petitioner presents no facts to support this allegation.

3. Petitioner misstates that the district court's opinion granting the motion for summary adjudication with respect to the Lick It Up Compositions implicates a matter of "'importance in the administration of the Bankruptcy' laws" (Petr.'s Br. 14 (quoting *Saper*, 336 U.S. at 329).) The motion for summary adjudication granted by the district court with respect to the Lick It Up Compositions was not based on any application of bankruptcy law. It was based on the merits and Petitioner's failure to present any evidence to support his claims. *Cusano v. Klein*, 280 F. Supp. 2d at 1040.

4. Petitioner misstates that the decision of the court of appeals in *Cusano I* "revived the 1983 Employment Agreement." (Petr.'s Br. 11.) This is a fundamental misstatement of fact. Nothing in *Cusano I* or in the 1990 bankruptcy plan rejected the 1983 Agreement. Accordingly,

---

18 at 428 (citation omitted) (emphasis added).) "And, perhaps most egregious of all his misconduct, plaintiff submitted a false affidavit to this Court challenging the genuineness of his signatures on the Revenge Agreements . . . ." (*Id.* (emphasis added))

the court in Cusano I did not "revive" the 1983 Agreement, because it remained extant.

5. Petitioner misstates the fact that, as of the purchase-option payment date of September 19, 1984, there was a "dispute concerning Respondents' rights under the Employment Agreement." (Petr.'s Br. 14.) At no time from that date until the filing of the complaint in the district court in 1997 did Petitioner ever "dispute" the fact or validity of the timeliness of the purchase-option payment.

6. Petitioner misstates that there were competing claims to the Lick It Up Compositions at the time of Petitioner's 1989 bankruptcy proceeding. (Petr.'s Br. 27.) In fact, in 1989 there were no competing claims with respect to the Lick It Up Compositions. Petitioner never objected to KISS's ownership of the copyright in and to the Lick It Up Compositions, nor did Petitioner ever seek to raise a competing claim with respect to those compositions in the bankruptcy court.

III. The Circuit Court's Decision Was Correct.

Petitioner claims that, by virtue of the appellate court's decision in *Cusano I*, he now has a copyright interest in the Lick It Up Compositions. (Petr.'s Br. 18.) This is incorrect. The Court in *Cusano I* did not reconvey to Petitioner any copyright interest in or to the Lick It Up Compositions. The Court merely found that Petitioner had standing to pursue a portion of Petitioner's royalty claims regarding the Lick It Up Compositions. "Cusano retains standing to sue for any royalty payments coming due post-petition." *Cusano*, 264 F. 3d at 948 (emphasis added).

Further, even though Petitioner failed to raise his reversion argument in the district court and, accordingly, it was not preserved for appeal, the court of appeals in *Cusano II* considered and flatly rejected this argument: "*Cusano I* did

not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." (Petr.'s App. A2 at ¶ 2.)

The bad faith of Petitioner's current argument is best exemplified by his statements to the district court immediately after the remand. The district court requested a status report regarding, among other things, the "impact on this case of the Ninth Circuit's ruling" in *Cusano I*. (Order Setting Status Conference Following Remand From The Ninth Circuit, entered Dec. 13, 2001 at 1; Appellees' SE 73 at 1484.) Petitioner did not argue, explicitly or implicitly, in the joint status report following remand that the court of appeals decision in *Cusano I* reconveyed to him a copyright interest in the Lick It Up Compositions. Petitioner responded: "[C]onfirmation of Plaintiff's bankruptcy reorganization plan caused all rights to post-petition royalties on Plaintiff's pre-petition compositions and other damages accruing post-petition to revert to Plaintiff." (Joint Status Report, dated Dec. 28, 2001, at 2; Appellees' SE 74 at 1488.)

In other words, when the district court wanted to know each party's position regarding the effect of the Ninth Circuit's ruling in *Cusano I*, Petitioner stated clearly on the record that only his claims for royalties had been remanded. Petitioner's new reversion argument is a post hoc fiction that the court of appeals in *Cusano II* found to be "frivolous." (Petr.'s App. A2 at ¶ 5.)

A. The Ninth Circuit's Decision In *Cusano I* Merely Reinstated Petitioner's Right to Assert Certain Royalty Claims.

Contrary to Petitioner's argument, nothing in the Ninth Circuit's decision in *Cusano I* altered the ownership of the copyrights in the Lick It Up Compositions. The Ninth

Circuit's opinion in *Cusano I* stated repeatedly that only Petitioner's royalty claims were being revived (in part):

- "We conclude that Cusano's scheduled 'songrights' asset reverted to him upon the confirmation of his reorganization plan . . . and vested in him all post-petition royalty rights to his pre-petition compositions . . . . He thus reacquired ownership of all claims to royalties derived from these compositions post-petition . . . . Thus, we reverse the district court in part, and reinstate some of Cusano's royalty claims." *Cusano*, 264 F.3d at 945 (emphasis added).

- "We conclude, therefore, that [Cusano's] listing of the 'songrights' asset was a sufficient scheduling of Cusano's interest in his pre-petition compositions, which reverted to him upon confirmation of his plan. The reversion vested in Cusano the rights to post-petition royalties on his pre-petition compositions . . . ." *Id.* at 947 (emphasis added).

Thus, in *Cusano I* the Ninth Circuit stated repeatedly that it was only reviving certain claims for royalties. Further, the Court in *Cusano I* stated clearly that only "Cusano's interest" in the Lick It Up Compositions reverted to him through his bankruptcy proceeding. In that, in 1989 when Petitioner filed for bankruptcy, he had no remaining ownership interest in the Lick It Up Compositions, he had no "interest" in those compositions that could revert to him on confirmation of his bankruptcy plan.

B. The Ninth Circuit in *Cusano II* Rejected Petitioner's Interpretation of the Court's Prior Decision.

The Ninth Circuit in *Cusano II* flatly rejected Petitioner's new argument that the court of appeals decision in *Cusano I* reconveyed a copyright interest in the Lick It Up Compositions to Petitioner. "Cusano misreads our opinion in [*Cusano I*], which held only that Cusano had standing to raise some of his claims. Cusano I did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." (Petr.'s App. A2 at ¶ 2 (citation omitted) (emphasis added).) "Cusano's entire appeal is frivolous . . . '[and] the arguments of error are wholly without merit.'" (*Id.* at ¶ 5 (citations omitted).)

What better court to know the intent of its prior opinion than the court which rendered that opinion? Petitioner's new argument that a copyright interest in the Lick It Up Compositions somehow reverted to him upon discharge from bankruptcy finds no support in the record of the lower courts, and presents no basis for review by this Court.

IV. No Basis Exists for the Court to Exercise Its Supervisory Authority.

Recognizing that the Petition fails to satisfy any conceivable basis for review by this Court, Petitioner argues that the Court should, nonetheless, consider the Petition based on its supervisory authority. (Petr.'s Br. 23.) However, Petitioner raises no issue important to the administration of bankruptcy law that would remotely warrant this Court exercising supervisory authority. Indeed, Petitioner's argument raises no disputed issue of law regarding application of the Bankruptcy Code. Petitioner merely disputes the fact that Respondents timely exercised the purchase-option

provision of the 1983 Agreement. That disputed fact does not raise any issue affecting the administration of bankruptcy law or the bankruptcy courts.

A. Petitioner Has Raised No Issue of Bankruptcy Law Requiring Resolution.

Petitioner suggests that because the Court has granted certiorari in certain cases important to the administration of bankruptcy law or other important federal statutes (even in the absence of a circuit split), certiorari is appropriate here. (Petr.'s Br. 23.) Petitioner, however, merely cites cases for that broad and uncontroversial principle, conveniently ignoring the circumstances of the cases cited—which raised significant legal questions begging resolution, unlike the case here. *See Callaway v. Benton*, 336 U.S. 132, 136, 69 S. Ct. 435, 439 (1949) (granting certiorari to resolve a conflict between state and federal courts on the issue of whether a corporation can convey property without the unanimous consent of shareholders in bankruptcy); *Wilkerson v. McCarthy*, 336 U.S. 53, 55, 69 S. Ct. 413, 414 (1949) (granting certiorari because the district court directed a verdict in a negligence case under the Federal Employer's Liability Act, which necessitated weighing evidence and thus usurped the statutory right to a jury trial); *Maggio v. Zeitz*, 333 U.S. 56, 61, 68 S. Ct. 401, 404 (1948) (granting certiorari because the issue of fraudulent bankruptcy was particularly important and subject to dispute within the Second Circuit).

Neither the disputed facts nor the legal principle in this case even remotely rise to the level of presenting a significant legal question requiring resolution by this Court as did the cases referenced above. Indeed, Petitioner cites narrowly focused cases for propositions so general that the case itself is actually irrelevant. *See, e.g., United States v. Ruzicka*, 329

U.S. 287, 288, 67 S. Ct. 207, 207 (1946) (involving specific questions regarding the administration of the Agricultural Marketing Act of 1937, but cited by Petitioner for the unremarkable proposition that certiorari is granted to resolve important questions in the administration of major federal statutes).

Petitioner also argues that, because the Court may grant review to correct clear errors below in an exercise of its supervisory powers, it should do so here. (Petr.'s Br. 24.) In the cases cited by Petitioner, however, there are significant reasons why the Court felt compelled to exercise that authority. Nearly all of the cases cited involve either constitutional rights or other primary civil rights that the Court found necessary to protect. *See, e.g., Florida v. Rodriguez*, 469 U.S. 1, 5, 105 S. Ct. 308, 310 (1984) (involving a misinterpretation of prior Fourth Amendment search-and-seizure case law);[13] *United States v. Hale*, 422 U.S. 171, 173, 95 S. Ct. 2133, 2135 (1975) (involving the parameters of the Fifth Amendment right to remain silent); *Montana v. Kennedy*, 366 U.S. 308, 309, 81 S. Ct. 1336, 1338 (1961) (involving the deportation of a fifty-five year alien who had resided in the United States since infancy); *see also City of Memphis v. Greene*, 451 U.S. 100, 102, 101 S. Ct. 1584, 1587 (1981) (involving alleged racial discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Thirteenth Amendment); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570–71, 99 S. Ct. 1355, 1358 (1979) (involving alleged discrimination under the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment).

---

[13] Petitioner cites the dissent in *Rodriguez*, rather than the opinion, for the general proposition that sometimes the Court must perform "a pure error-correcting function." (Petr.'s Br. 24 (citing 469 U.S. at 7 (Stevens, J., dissenting).)

Here, there is no crucial constitutional or civil right issue at stake, nor is there any irregularity in the rulings of the lower courts. Petitioner merely desires a different result because all prior courts ultimately have ruled in Respondents' favor.

B. There Is No Basis For the Court to Issue Summary Reversal.

Finally, Petitioner makes the wholly unsupported argument that this case merits summary disposition by the Court. (Petr.'s Br. 25–26.) The only authority cited by Petitioner for this argument is *Schweiker v. Hansen*, 450 U.S. 785, 791, 101 S. Ct. 1468, 1472 (1981). Petitioner, however, merely cites the dissent in that case for the following language on the limited circumstances when summary disposition may be appropriate: "[when] the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Id.*

This Court has acknowledged that "[s]ummary reversals of courts of appeals are unusual under any circumstances." *Office of Personnel Mgmt. v. Richmond*, 46 U.S. 414, 422, 110 S. Ct. 2465, 2470 (1990). Further, here, the facts are in dispute, and error below is anything but clear; rather, there is a consistent appellate record against Petitioner. Nothing in the court of appeals' decision in *Cusano II* warrants the extraordinary remedy of a summary reversal by the Court, and the single case cited by Petitioner for its language alone is utterly irrelevant.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Brian G. Wolf
Counsel of Record
Henry L. Self III
Kristina Brittenham
LAVELY & SINGER, P.C.
2049 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 556-3501

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56650

D.C. No. CV-97-04914-AHM

[Filed February 15, 2006]

VINCENT CUSANO, individually d/b/a Vinnie Vincent Music, d/b/a Streetbeat Music f/k/a Vinnie Vincent,
Plaintiff- Appellant,

v.

GENE KLEIN, an individual; STANLEY EISEN, an individual; THE KISS COMPANY, a New York Corporation; GENE SIMMONS WORLDWIDE INC., a Delaware Corporation; SIMSTAN MUSIC LTD., a Delaware Corporation; KISSTORY LTD.; POLYGRAM RECORDS, INC., a Delaware Corporation; HORIPRO ENTERTAINMENT GROUP, a California Corporation; PAUL STANLEY,
Defendants - Appellees.

ORDER

Before: **KOZINSKI**, Circuit Judge.

Appellant's motion for reconsideration is construed as a motion to recall the mandate, and is DENIED. No additional filings from Appellant will be accepted.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 89-04620-CA

[Executed March 21, 1989]

In re	)
VINCENT J. CUSANO	)
aka "VINNIE VINCENT"	)
Debtors	)
	)

Manatt, Phelps, Rosenberg & Phillips
Simon Aron.
Lisa E. Bittan
Todd W. Mathers

Name

Address 11355 West Olympic Boulevard
Los Angeles, California 90064

Telephone (213) 312-4000
Attorney for Debtor(s)

STATEMENT OF EXECUTORY CONTRACTS

The debtor has the following executory contracts:

1. International Talent Group
   729 7th Avenue
   New York, NY 10019
   (Booking Agency)

2. Brockum
   850 7th Avenue, Room 301
   New York, NY 10019
   (Merchandising)

3. Nigel Thomas
   c/o AXIS Worldwide,;Ltd.
   7 Gower Street
   London, England
   (Debtor contends contract was already terminated and is not an executory contract. If it is, Debtor will reject contract.)

I, VINCENT J. CUSANO, the debtor(s) named (or the president or other officer or authorized agent of the corporation named as debtor, or a member or an authorized agent of the partnership named as debtor) in the forgoing statement, do hereby declare, under penalty of perjury, that the statements contained therein are true and correct. (and that the filing of this statement on behalf of the corporation (or partnership) has been authorized).

Executed on 3/21/1989 /s/_____
VINCENT J. CUSANO
Petitioner

APPENDIX C

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

Case No. LA 89-04620-ES
Chapter 11

[Filed April 23, 1999]

In re	)
VINCENT J. CUSANO	)
aka VINNIE VINCENT,	)
Debtor.	)
	)

ORDER DENYING DEBTOR'S MOTION TO REOPEN BANKRUPTCY CASE

DATE: March 2, 1999
TIME: 10:30 a.m.
CTRM: Courtroom 1652

The "Motion For Order Reopening Case Pursuant To 11 § U.S.C. § 350" (the "Motion") filed by Vincent Cusano (the "Debtor") came on regularly for hearing on March 2 at 10:30 a.m. in Courtroom "1652" located at 255 E. Temple Street, Los Angeles, CA 90012. The Debtor appeared through his counsel of record, Valensi, Rose & Magaram by Darren Martinez. Gene Klein p/k/a Gene Simmons, Paul Stanley,

The Kiss Company, Gene Simmons Worldwide, Inc., Simstan Music, Ltd. Kisstory Ltd., and Polygram Records, Inc. (collectively the "Kiss Parties") appeared through their attorneys of record, Leslie A. Cohen of Goldberg, Scott, Belfield, Steinberg & Cohen, a Professional Law Corporation and Brian G. Wolf of Lavely & Singer, a Professional Corporation.

The Court, having considered the Motion, the Kiss Parties' Opposition and Supplemental Opposition (including the declarations of Brian Wolf) thereto, the statements and arguments of counsel at the hearing,

It is HEREBY ORDERED as follows:

A. The Motion is hereby denied.

B. The Bankruptcy Court will not reconsider the findings that have already been made by the District Court in the pending litigation in the United States District Court for the Central District of California between the Debtor and the Kiss Parties, including without limitation its findings that any claims for unpaid royalties on prepetition musical compositions did not revert to Debtor and that such claims were never formally abandoned to Debtor.

C. To the extent the Debtor is seeking to reopen the case so he can assert claims for unpaid royalties on pre-petition musical compositions as claims of the Estate, that request is denied.

D. To the extent the Debtor is seeking to reopen the case so he can assert claims for unpaid royalties on pre-petition musical compositions in his individual capacity, that request is denied.

~~E. Any claims for unpaid royalties on pre-petition musical compositions did not revert to Debtor nor were such claims abandoned to Debtor.~~

F. All claims based on facts predating Debtor's bankruptcy, including claims for unpaid royalties on pre-petition musical compositions remain assets of the estate, and the Estate is Closed;

G. The Debtor's Plan was fully consummated in 1993 and therefore pursuant to 11 U.S.C. § 1127(b), this Court has no authority to allow the Debtor to amend the Plan for any purpose, including the administration of the estate assets through such plan entered in the Debtor's case and cause does not exist for the reopening of Debtor's Chapter 11 bankruptcy case.

~~H. The Plan is fully consummated and may not be amended.~~

I. The doctrine of laches constitutes a separate and independent ground for denying the motion.

DATED: 4/23/99 /s/ _____
ERITHE SMITH
United States Bankruptcy Judge

Submitted by:

/s/ _____
LESLIE A. COHEN
GOLDBERG, SCOTT, BELFIELD,
STEINBERG & COHEN
Attorneys for the Kiss Parties

NOTICE OF ENTRY JUDGMENT OR ORDER AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 116(1)(a)(iv), that a judgment or order entitled *(specify)*:

ORDER DENYING DEBTOR'S MOTION TO REOPEN BANKRUPTCY CASE

was entered on *(specify date)*: Apr 27 1999

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment of the persons and entities attached service list on *(specify date)*: Apr 27 1999

Dated: APR 27 1999

JON D. CERETTO
Clerk of the Bankruptcy Court

by: /s/ Tina Johnson
Deputy Clerk